SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 909

PHOENIX-EL PASO EXPRESS, INC.,
Petitioner,

vs.

NATIONAL CARLOADING CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF IN SUPPORT THEREOF.

ROBERT L. HOLLIDAY,
HAROLD L. SIMS,
Counsel for Petitioner.

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PHOENIX-EL PASO EXPRESS, INC.,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Phoenix-El Paso Express, Inc., respectfully presents this, its petition for certiorari to the Supreme Court of the State of Texas, and to such end respectfully shows:

Summary and Short Statement of the Matter Involved.

On October 28, 1941, petitioner, as plaintiff, recovered judgment against respondent National Carloading Corporation for the sum of Nine Hundred Ninety-Nine Dollars and Sixty-Eight Cents ($999.68) in the Forty-First Judicial District Court of El Paso County, Texas (R. 26-33). This

judgment was based upon the cause of action alleged by petitioner in its second amended original petition, which may be briefly summarized as follows:

Petitioner's predecessor in interest and assignor, at all times relevant, was a federal motor common carrier operating between El Paso, Texas, and Phoenix, Arizona, under authority of a certificate of public convenience and necessity issued by the Interstate Commerce Commission. During the period of July, 1937, to November, 1937, petitioner's predecessor and assignor carried nine freight shipments from El Paso to Phoenix for respondent, and collected from respondent freight charges therefor based upon a rate of Forty-Five Cents ($.45) per hundred pounds. Said shipments moved in interstate commerce under written bills of lading or shipping orders issued by respondent. Said freight rate of Forty-Five Cents per hundred pounds was paid by respondent and received by petitioner's predecessor by virtue of a preexisting oral arrangement between the parties. At all times relevant, petitioner's predecessor had established, published, and duly on file with the Interstate Commerce Commission its tariffs which provided that the applicable rate between El Paso, Texas, and Phoenix, Arizona, was Eighty-Five Cents ($.85) per hundred pounds. The Forty-Five Cents per hundred pounds rate was paid by respondent and received by petitioner under respondent's claim that it was a federal motor common carrier or contract carrier, and thus was entitled to participate in joint rates with petitioner's predecessor, or was entitled to pay petitioner's predecessor only a division of the through rate established by respondent. Petitioner further alleged that on January 4, 1940, the Interstate Commerce Commission had found that respondent was a freight forwarder and not a common carrier by motor vehicle, or a contract carrier by motor vehicle, such decision being

rendered in Docket No. MC-40,639, reported in 21 MCC 309. Petitioner further alleged that respondent was not entitled to share in so-called joint rates or concurrences with petitioner's predecessor or other motor common carriers because of the decision rendered May 7, 1940, by the Interstate Commerce Commission in the cause styled *Tariffs of Forwarding Companies, Ex Parte, No. MC-31,* reported in 23 MCC 95. Petitioner alleged that it was therefore entitled to collect the difference between the Forty-Five Cent rate paid by respondent as freight charges on the nine shipments, and the legal rate of Eighty-Five Cents per hundred pounds as required by its published and filed tariffs (R. 1-11). Judgment was rendered in the trial court in petitioner's favor and against respondent for such difference in the freight charges (R. 26-33).

Thereafter, in due time, upon its motion for new trial being overruled, respondent gave notice of appeal to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, sitting at El Paso (R. 40-41).

While the cause was pending on appeal, the Congress of the United States enacted Part IV of the Interstate Commerce Act (Public Law No. 558, 77th Congress, Second Session, app. May 16, 1942) (Act May 16, 1942, c. 318 § 1, Stat. 284) (Title 49 U. S. C. Secs. 1001-1022).

The Court of Civil Appeals reversed petitioner's judgment on the sole ground that said statute, and in particular, Section 419 of Part IV of the Interstate Commerce Act, granted respondent immunity from all past liability and thus abolished petitioner's cause of action and judgment based thereon (R. 41-50). The Court of Civil Appeals ordered the cause remanded to the trial court with instructions to dismiss petitioner's suit (R. 50).

Thereafter, petitioner applied for writ of error from the Supreme Court of Texas to the Court of Civil Appeals,

and its application was granted. The Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals (R. 63-73). Ever since the passage of said Part IV of the Interstate Commerce Act, petitioner in both Court of Civil Appeals and in the Supreme Court of Texas has contended and still contends that said Section 419 of Part IV of the Interstate Commerce Act is not retroactive and not applicable to petitioner's cause of action and was not so intended by the Congress, and that if Congress, in enacting said statute, intended such effect, that such statute would be unconstitutional in depriving petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

This Honorable Court Has Jurisdiction.

Judgment in the trial court was rendered in favor of petitioner and against respondent on October 28, 1941 (R. 26-33). Respondent gave notice of appeal to the Court of Civil Appeals on December 30, 1941 (R. 40-41). Section 419 of Part IV of the Interstate Commerce Act was approved May 16, 1942. The Court of Civil Appeals rendered its decision April 1, 1943, reversing the judgment of the trial court and remanding the cause with instructions to dismiss petitioner's suit (R. 41-50). The order of the Court of Civil Appeals based upon its decision was entered April 1, 1943 (R. 50).

As shown by its opinion, the Court of Civil Appeals reversed petitioner's judgment on the sole ground that said Section 419 of Part IV of the Interstate Commerce Act granted respondent immunity from all past liability for freight shipments which occurred prior to the enactment of said statute, even though such claimed freight charges had been reduced to judgment prior to the passage of said law.

Since the law had not been enacted at the time suit was tried in the district court, petitioner could not there raise the Federal questions here urged; but at the first opportunity, it did raise said questions, that is to say, petitioner on April 15, 1943, filed its motion for rehearing, in the Court of Civil Appeals. In said motion for rehearing, petitioner, by proper assignments of error, attacked the holding of the Court of Civil Appeals that Section 419 of Part IV of the Interstate Commerce Act abolished petitioner's cause of action and judgment based thereon by granting immunity from liability for past freight charges due by respondent.

Petitioner expressly charged the Court of Civil Appeals with error in holding (1). that said statute bars recovery by petitioner against respondent; (2). that said Act of Congress was intended to be, or was in fact, applicable to petitioner's cause of action; (3). that said statute extended to and was applicable to civil liability rather than being limited to criminal liability or punishment; (4). that said statute granted respondent immunity from civil liability against petitioner's cause of action; (5). that said Section 419 of Part IV of the Interstate Commerce Act was constitutional and not violative of the "due process clause" of the Fifth Amendment to the Constitution of the United States, insofar as said Act of Congress was intended to be, or was in fact, applicable to petitioner's cause of action; and (6). petitioner charged that the holding of the Court of Civil Appeals deprived petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States (R. 51-52).

On April 22, 1943, the Court of Civil Appeals entered its order to the effect that petitioner's motion for rehearing was duly considered but overruled (R. 55). In connection with its order overruling petitioner's motion for rehearing, the Court of Civil Appeals wrote a short addi-

tional opinion holding that where Congress has created a cause of action, it may be taken away at any time (R. 55).

In due time, on May 21, 1943, petitioner filed its application for writ of error from the Supreme Court of Texas to the Court of Civil Appeals (R. 56-62), and such application was granted by the Supreme Court of Texas by order entered July 21, 1943 (R. 62).

In its application for writ of error, petitioner specifically raised the Federal questions here urged by six assignments of error, which may be summarized as follows: The Court of Civil Appeals erred in reversing petitioner's judgment and ordering the cause dismissed (1). by holding that Section 419 of Part IV of the Interstate Commerce Act granted respondent immunity from civil liability; (2). by holding that said statute was applicable to petitioner's cause of action; (3). by holding that said statute bars any recovery by petitioner against respondent; (4). by holding that said Section 419 of Part IV of the Interstate Commerce Act was not limited to criminal liability or punishment; (5). by holding that Section 419 of Part IV of the Interstate Commerce Act was constitutional and not repugnant to the "due process clause" of the Fifth Amendment to the Constitution of the United States insofar as said statute was intended to be, or was in fact, applicable to petitioner's cause of action; and (6). that the opinion of the Court of Civil Appeals and judgment based thereon, reversing petitioner's judgment, was a deprivation of petitioner's property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States (R. 56-58).

On December 15, 1943, the Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals by order entered that day (R. 74-75) in accordance with the written opinion of the Supreme Court of Texas (R. 63-73). As shown by its opinion, the Supreme Court of Texas affirmed

the judgment of the Court of Civil Appeals on the sole proposition that said Section 419 of Part IV of the Interstate Commerce Act abolished petitioner's cause of action and judgment based thereon, and the Court expressly held that said statute did not violate the "due process clause" of the Fifth Amendment to the Constitution of the United States (R. 63-73).

On December 28, 1943, petitioner duly filed its motion for rehearing in the Supreme Court of Texas. In its motion for rehearing, petitioner properly raised the Federal questions urged here by proper assignments of error, which are summarized as follows: The Supreme Court of Texas erred (1) in holding that Section 419 of Part IV of the Interstate Commerce Act bars any recovery by petitioner against respondent; (2) that said statute was intended to be applicable to petitioner's cause of action which accrued long prior to the passage of said act; (3) in failing to hold that said statute was limited to criminal liability or punishment, not extending to civil liability; (4) in holding that said statute granted respondent immunity from civil liability against petitioner's cause of action; (5) in holding that said statute was constitutional and not violative of the "due process clause" of the Fifth Amendment to the Constitution of the United States insofar as said statute was intended to be, or was in fact, applicable to petitioner's cause of action; (6) in holding that the judgment of the Court of Civil Appeals should be affirmed upon the sole ground that said Section 419 of Part IV of the Interstate Commerce Act bars any recovery by petitioner, such holding depriving petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States; (7) in holding that said Section 419 of Part IV of the Interstate Commerce Act was intended to have a retroactive effect, thereby abolishing petitioner's cause of action; (8) in holding that petitioner's cause of action was a mere statu-

tory right which could be repealed, and deprive petitioner of its cause of action (R. 75-77).

On January 19, 1944, the Supreme Court of Texas entered its order overruling petitioner's motion for rehearing, such order reciting that petitioner's motion was overruled after due consideration of same (R. 77).

Petitioner here seeks review of the final judgment of the Supreme Court of Texas entered January 19, 1944, overruling petitioner's motion for rehearing (R. 77). The Supreme Court of Texas is the highest court of the State in which a decision could be had. Art. V, Sections 1 and 3, Constitution of Texas; Art. 1728, Revised Civil Statutes of Texas, 1925. This petition for certiorari is filed within three months of January 19, 1944, and there is presented herewith a certified copy of the transcript of the record and proceedings in the Supreme Court of Texas.

The Supreme Court of the United States, in view of the foregoing, has jurisdiction to issue the writ of certiorari to the Supreme Court of Texas by virtue of Section 237 (b) of the Judicial Code, as amended (28 U. S. C. Section 344 (b)). Petitioner having drawn in question the validity of Section 419 of Part IV of the Interstate Commerce Act, and the Supreme Court of Texas having sustained respondent's claimed right, privilege, and immunity under said statute, —Section 419 of Part IV of the Interstate Commerce Act, —this Honorable Court should issue the writ because the Federal questions presented are substantial.

Said Section 419 of Part IV of the Interstate Commerce Act (Public Law No. 558, 77th Congress, Second Session, app. May 16, 1942) (Act May 16, 1942, c. 318 § 1, Stat. 284) (Tit. 49 U. S. C. Secs. 1001-1022) provides:

"Liability for Past Acts and Omissions.

"No person shall be subject to any punishment or liability under the provisions of this act on account of

any act done or omitted to be done prior to the effective date of this Part, in connection with the establishment, charging, collection, receipt or payment of rates of freight forwarders or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this Act."

As codified, said section appears in 49 U. S. C. Sec. 1019 as follows:

"Liability for Past Acts and Omissions.

"No person shall be subject to any punishment or liability under the provisions of this chapter and chapters 1, 8, and 12 of this title on account of any act done or omitted to be done, prior to the effective date of this chapter, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle, subject to this chapter and chapters 1, 8, and 12 of this title."

Said statute was never meant by Congress to be applicable to petitioner's cause of action, and its application should be limited to past criminal liability and punishment, under familiar rules of statutory construction. *Right of Way Oil Co.* vs. *Gladys City Oil and Gas Co.*, 106 Tex. 94, 157 S. W. 737.

The Congress never intended said statute to have a retroactive application, which would abolish petitioner's cause of action: *U. S.* vs. *St. L. S. F. & T. Ry. Co.*, 270 U. S. 1, 46 S. Ct. 182, 70 L. Ed. 435; *Reynolds* vs. *McArthur*, 27 U S. 417, 2 Pt. 417, 7 L. Ed. 470; *Hassett* vs. *Welch*, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858; *U. S. Fidelity & Guaranty* vs. *U. S.*, 209 U. S. 306, 28 S. Ct. 537, 52 L. Ed. 804; *In Re Twenty Per Cent Cases*, 87 U. S. 179, 20 Wall. 179, 22 L. Ed. 339; *U. S.* vs. *Heth*, 3 Cranch 399, 2 L. Ed. 479; *U. S.* vs. *Burr*, 159 U. S. 78, 15 S. Ct. 1002, 40 L. Ed. 82; *Shwab* vs. *Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747.

The construction placed upon said Section 419 of Part IV of the Interstate Commerce Act by the State Appellate Courts had the effect of abolishing petitioner's cause of action and judgment based thereon, and thus constituted a deprivation of petitioner's property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. *U. S.* v. *St. L. S. F. & T. Ry. Co.*, 270 U. S. 1, 46 S. Ct. 182, 70 L. Ed. 435; *Herrick* v. *Boquillas Land & Cattle Co.*, 200 U. S. 97, 26 S. Ct. 192, 50 L. Ed. 389; *Pacific Mail Steamship Co.*, v. *Joliffe*, 69 U. S. 450, 2 Wall. 450, 17 L. Ed. 805; *Chemical Foundation* v. *Du Pont* (C. C. A.) 39 F. (2d) 366, affirmed 283 U. S. 152, 51 S. Ct. 403, 75 L. Ed. 919; *Pritchard* v. *Norton*, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104; *Lynch* v. *U. S.*, 292 U. S. 571; 54 S. Ct. 840, 78 L. Ed. 1434; *Ettor* v. *Tacoma*, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773; *Forbes Pioneer Boat Co.* v. *Board of Commissioners*, 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647; *Choate* v. *Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941.

The foregoing authorities clearly demonstrate that the Federal questions here urged are substantial, and this Honorable Court has never passed upon them. It is respectfully submitted that the Court has jurisdiction to issue the writ and correct the judgment of the State Court.

The Questions Presented.

The ultimate question presented for review is whether or not said Section 419 of Part IV of the Interstate Commerce Act bars petitioner any recovery against respondent and has the effect of granting respondent immunity from liability for all freight charges incurred prior to the passage of said statute. The answer to this ultimate question depends upon the answers to the following three component questions: 1. Did Congress intend said Section 419 of Part IV of the Interstate Commerce Act to apply to civil actions

as well as to criminal liability? 2. Did Congress intend said statute to have a retroactive effect as to accrued civil causes of action? 3. If said statute should be applied to petitioner's cause of action, is said statute constitutional and not repugnant to the "due process clause" of the Fifth Amendment to the Constitution of the United States?

Reasons for Allowance of the Writ.

The Supreme Court of Texas decided the foregoing substantial Federal questions which have not been determined by the Supreme Court of the United States, and decided said questions in a way probably not in accord with the applicable decisions of the Supreme Court for the United States.

Opposing Counsel.

Counsel for respondents are Mr. Thornton Hardie, 710 Bassett Tower, El Paso, Texas, Mr. P. J. Coughlin of New York City, and Mr. Robert E. Quirk of Washington, D. C., and they have been duly served with copies of this Petition, supporting brief, and the record herein.

Wherefore, for the reasons set forth herein, as well as in the supporting brief annexed hereto, petitioner respectfully prays this Honorable Court to issue its writ of certiorari to the Supreme Court of Texas, commanding said State Court to send up forthwith a full and complete transcript of the record, that all proceedings be certified to this Court, and that this cause be reviewed and the errors of the Supreme Court of Texas be corrected, as provided by law; that upon hearing by this Honorable Court, the judgment of the Supreme Court of Texas be reversed, and that the judgment in petitioner's favor, rendered in the Forty-First Judicial District Court of El Paso County, Texas, be affirmed, and

that petitioner recover its interest thereon and all costs and for such further relief to which petitioner may be entitled to receive.

ROBERT L. HOLLIDAY,
El Paso, Texas.
HAROLD L. SIMS,
El Paso, Texas.
Attorneys for Petitioner.

THE STATE OF TEXAS,
County of El Paso:

Robert L. Holliday, being duly sworn, says that he is of counsel for Phoenix-El Paso Express, Inc., petitioner in the foregoing petition for certiorari, that he prepared the foregoing petition, and that the allegations therein contained are true and that there is just cause for same as he verily believes.

ROBERT L. HOLLIDAY.

Subscribed and sworn to before me this 8th day of April, 1944.

[SEAL.]

STEPHEN BROWN,
Notary Public,
El Paso County, Texas.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 909

PHOENIX-EL PASO EXPRESS, INC., PETITIONER,

vs.

NATIONAL CARLOADING CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

May It Please The Honorable Court:

Opinions of the Courts.

The written opinion of the Court of Civil Appeals appears at Page 41 of the Record, but same has not been and will not be published, by order of that Court (R. 50). The opinion of the Court of Civil Appeals on petitioner's motion for rehearing appears on Page 55 of the Record and likewise will not be published. The opinion of the Supreme Court of Texas on original submission appears at Page 63 of the Record, and same has not yet been officially published, but will be found reported in 176 S. W. 2d. 564. The Supreme Court of Texas did not write any opinion on petitioner's motion for rehearing herein.

Grounds of Jurisdiction Invoked.

I.

The Supreme Court of Texas ruled that Section 419 of Part IV of the Interstate Commerce Act was applicable to petitioner's cause of action and granted respondent immunity from liability against petitioner's cause of action. Said statute is comparatively recent, having been approved May 16, 1942, and neither the construction nor the application of said statute has been passed upon by this Honorable Court.

II.

The Supreme Court of Texas based its opinion upon the sole ground that said statute was applicable to petitioner's cause of action and barred petitioner any recovery against respondent.

III.

In thus construing and applying said statute, the Supreme Court of Texas held in a way probably not in accord with the applicable decisions of the Supreme Court of the United States in that:

A. Said Section 419 of Part IV of the Interstate Commerce Act was intended by the Congress to apply only to criminal prosecutions and penal forfeitures.

B. Said statute was not intended by the Congress to have a retroactive operation as to civil causes of action, such as petitioner's suit herein.

C. If the Congress had intended said statute to apply to civil causes of action which had already accrued at the time of the enactment of said law, such intended application would render said statute unconstitutional and repugnant to the "due process clause" of the Fifth Amendment to the Constitution of the United States.

Concise Statement of the Case.

In the interest of brevity, we shall not repeat the statement of the nature of the case as shown in our foregoing petition for certiorari, but will now briefly supplement such statement.

Petitioner's predecessor and assignor, at all material times, was a federal motor common carrier within the meaning of Part II of the Interstate Commerce Act and was authorized to, and did transport freight under a certificate of public convenience and necessity issued by the Interstate Commerce Commission (R. 78, 63). Between July 28, 1937, and November 7, 1937, petitioner's predecessor and assignor transported for respondent nine shipments of freight from El Paso, Texas, to Phoenix, Arizona. Each of the shipments in question was made under a straight bill of lading or shipping order issued by respondent, which stipulated that the property was received subject to classifications and tariffs in effect on the date of issue.

For such nine shipments, which were admittedly interstate commerce, petitioner's predecessor and assignor was paid by respondent freight charges based upon the rate of Forty-Five Cents per hundred pounds. It was stipulated that the legal rate for such shipments was Eighty-Five Cents per hundred pounds, as shown by the tariffs of petitioner's predecessor and assignor on file with the Interstate Commerce Commission.

If the published rates of petitioner's predecessor and assignor had been charged for such shipments, the charges therefor would have been Twenty One Hundred Twenty Two Dollars and Eighty Four Cents ($2122.84), which is Nine Hundred Ninety Nine Dollars and Sixty Eight Cents ($999.68) in excess of the amount actually collected. The latter amount was recovered by petitioner against respondent by judgment in the trial court (R. 78, 65).

Respondent, at all material times, was a freight forwarder conduction a nation-wide freight forwarding business (R. 78, 63). Petitioner concedes that respondent was thus engaged, and petitioner further concedes that at all material times, respondent was a freight forwarder within the meaning of Part IV of the Interstate Commerce Act, as defined by Section 402 thereof (49 U. S. C. Sec. 1002). At all material times, respondent had on file with the Interstate Commerce Commission its purported tariffs, naming through rates to be collected on its billing from shippers and consignees, and petitioner's predecessor and assignor had duly filed its concurrences as a participant in respondent's purported published tariffs (R. 78, 63).

Respondent, on February 10, 1935, filed application with the Interstate Commerce Commission for a certificate of public convenience and necessity under the "grandfather clause" of the Motor Carrier Act of 1935 (49 U. S. C. Sec. 306a). On January 4, 1940, the Interstate Commerce Commission denied respondent's application for certificate and found that respondent was neither a common carrier by motor vehicle, nor a contract carrier by motor vehicle, under the provisions of the Motor Carrier Act of 1935 (R. 78, 66-67). On May 7, 1940, the Interstate Commerce Commission ruled that the operations of respondent and its tariffs and joint rates filed with the Commission were improperly on file, and that respondent and other similar operators were not entitled to share in joint rates or divisions of through rates with motor common carriers (R. 78, 66-67).

Inasmuch as respondent had claimed the right to share in a division of joint rates with petitioner's predecessor and assignor, and settlement by the parties had been arrived at, under an oral arrangement between the parties, for the Forty-Five Cent rate, petitioner brought suit for the difference in freight charges between the Eighty-Five Cent and

Forty-Five Cent rates (R. 1-11). Petitioner recovered judgment against respondent on October 28, 1941 (R. 26-33).

While the cause was pending in the Court of Civil Appeals on appeal by respondent, the Congress enacted Part IV of the Interstate Commerce Act (Public Law No. 558, 77th Congress, 2d Session, app. May 16, 1942) (Act May 16, 1942, c. 318 § 1 Stat. 284) (Tit. 49 U. S. C. Secs. 1001-1022).

The respondent interposed said statute as a complete defense to this suit, and it was by virtue of said statute that the Court of Civil Appeals held that the respondent was not liable for the undercharges claimed (R. 68). The Supreme Court of Texas, in affirming the opinion of the Court of Civil Appeals, said:

"We think the Court of Civil Appeals was correct in its conclusion that the quoted section from the 1942 amendment (Sec. 419 of Part IV of the Interstate Commerce Act) is a complete bar to the recovery of the plaintiff" (R. 69).

Specification of Assigned Errors to Be Urged.

I.

The Supreme Court of Texas erred in affirming judgment of the Court of Civil Appeals and in holding that Section 419 of Part IV of the Interstate Commerce Act bars any recovery by petitioner against respondent, and in particular, erred in holding that said statute was intended to be applicable to petitioner's cause of action which accrued long prior to the passage of said act of Congress (Germane to Assigned Errors I and II, petitioner's motion for rehearing, R. 75).

II.

The Supreme Court of Texas erred in failing to hold that said statute was limited to criminal liability or punishment,

and in holding that such statute applied to civil liability (Germane to Assigned Error III, petitioner's motion for rehearing, R. 75).

III.

The Supreme Court of Texas erred in holding that said statute granted respondent immunity from civil liability (Germane to petitioner's Assigned Error IV, motion for rehearing, R. 76).

IV.

The Supreme Court of Texas erred in holding that said statute was intended to have a retroactive effect, and further erred in holding that petitioner's cause of action was a mere statutory right which could be repealed (Germane to petitioner's Assigned Errors VII and VIII, R. 76).

V.

The Supreme Court of Texas erred in holding that said statute is constitutional and not violative of the "due process clause" of the Fifth Amendment to the Constitution of the United States of America insofar as said statute was intended to be or was, in fact, applicable to petitioner's cause of action (Germane to petitioner's Assigned Errors V and VI, motion for rehearing, R. 76).

Summary of Argument.

Petitioner's predecessor and assignor carried the nine freight shipments in question from El Paso, Texas, to Phoenix, Arizona, in 1937. At such time, petitioner's predecessor was the holder of a certificate of public convenience and necessity as a federal motor common carrier. It had on file with the Interstate Commerce Commission its duly established and published tariffs governing the shipments in question. Its applicable rates required the payment of freight charges based upon a rate of Eighty-

Five Cents per hundred pounds. Under the applicable law (Sec. 217b, Part II, Interstate Commerce Act) (49 U. S. C. Sec. 317b), it could not legally deviate from its filed tariffs. By collecting and receiving as freight charges from respondent on the basis of Forty-Five Cents per hundred pounds, petitioner had not only the right but also the duty to collect the difference as undercharges. The transactions were contractual in their nature, the freight being tendered by respondent and petitioner accepting the freight for transportation. The shipments were actually carried from El Paso to Phoenix. Thus petitioner fully discharged its contractual obligation. There remained only the payment by respondent to petitioner of the legal freight charges. Respondent had paid less than the legal freight charges. Thus, petitioner was bound to institute suit therefor upon the respondent's refusal to pay the undercharges. Petitioner recovered the amount of its undercharges by judgment in the trial court.

Some eight months later, the Congress enacted Part IV of the Interstate Commerce Act, and while the cause was pending on appeal. Respondent thereupon interposed said new law as a complete defense to petitioner's judgment and cause of action. A careful reading of Part IV, and especially Section 419 thereof (49 U. S. C. Sec. 1019) discloses that the Congress did not intend said statute to apply to petitioner's accrued cause of action and judgment based thereon. It is perfectly apparent that the Congress intended to exempt persons only from criminal prosecutions and penal forfeitures. This construction is implicit in view of the extremely strong presumption that Congress never intends a statute to have a retroactive operation as to fixed contractual or common law rights. A consideration of the entire Act, that is, Part IV of the Interstate Commerce Act, and especially Section 409 thereof (49 U. S. C. Sec. 1009), reenforces the conclusion that

Congress never intended said statute to have a retroactive operation insofar as petitioner's cause of action and judgment are concerned.

To construe such statute as having a retroactive operation on petitioner's cause of action raises a serious and, in fact, an insurmountable constitutional question. The "due process clause" of the Fifth Amendment to the Constitution is still in full force and effect in this country, so far as we are advised. We realize the plenary powers given Congress under the commerce clause of the Constitution; but, nevertheless, the powers granted under the commerce clause are subject to the restrictions and prohibitions of the Fifth Amendment.

Surely a contractual right, which arose by petitioner's predecessor's full performance of a preexisting contract, with nothing more to be done upon its part, cannot be abolished by the Congress under the pretext of regulating interstate commerce. The statute in question can be construed in such a way as to eliminate the constitutional question and yet carry out the Congressional intent. It should be so construed.

Argument.

The statute which the State Courts held granted respondent immunity from liability herein, as codified, is as follows:

> "Liability for Past Acts and Omissions.
>
> "No person shall be subject to any punishment or liability under the provisions of this chapter and chapters 1, 8, and 12 of this title on account of any act done or omitted to be done, prior to the effective date of this chapter, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor ve-

hicle, subject to this chapter and chapters 1, 8, and 12 of this title." (49 U. S. C. Sec. 1019).

It will be noted that said statute provides that no person shall be subject to any punishment or liability under various provisions of the Interstate Commerce Act. The word "punishment" is first used and is coupled with the word "liability." The word "liability" has a broader connotation than the word "punishment." If Congress had intended the act to apply both to civil and criminal acts, the word "liability" would have been sufficient without inserting the word "punishment." Very evidently, the Congress intended the statute to be more restrictive than the use of the word "liability" only would have given it. The rule of *ejusdem generis* is applicable here.

In *Right of Way Oil Co.* v. *Gladys City Oil and Gas Co.*, 106 Tex. 94, 157 S. W. 737, it was said:

> "The rule of construction of 'ejusdem generis' is thus stated, 'General words following particular words will not include things of a superior class.' There is this further restriction of general words following particular words, that the general words will not include any of a class superior to that to which the particular words belong" (at 157 S. W. 739).

In the statute under consideration, the particular word "punishment" was first used by Congress, followed by the general word "liability." Therefore, the general word "liability" will not include anything broader than the preceding particular word "punishment." By common usage, "punishment" ordinarily refers to a violation of a penal statute.

It should be remembered that the Interstate Commerce Act contains a number of provisions denouncing violations and fixing punishments therefor. Most of such penal violations are punishable by either or both fine and imprison-

ment. Certainly, the Congress used the phrase "punishment or liability" deliberately in order to obviate any question of whether the word "punishment" should be limited to offenses punishable by imprisonment. It is evident that Congress meant to excuse violators who might suffer either imprisonment, monetary fines, or other pecuniary sanctions.

This conclusion is further strengthened by the report of the Committee on Interstate and Foreign Commerce as shown by House Report No. 1172, 77th Congress, First Session. On page 18 of said report, with reference to said statute regarding liability for past acts and omissions, the Committee expressly stated:

"Common law and contractual rights, remedies, and liabilities are not affected by this provision."

Certain it is that petitioner's cause of action here is based upon contractual rights for services long since performed, with nothing remaining to be done by petitioner as the carrier. Surely Congress did not intend said statute to have a retroactive effect on petitioner's cause of action.

From its earliest days, this Honorable Court has followed the rule of construction that no statute is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or to be necessarily implied. Pursuant to that rule, courts will apply new statutes only to future cases unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms. *In Re*

Twenty Per Cent Cases, 87 U. S. 179, 20 Wall. 179, 22 L. Ed. 339.

In *Reynolds* v. *McArthur*, 27 U. S. 417, 2 Pt. 417, 7 L. Ed. 470, Chief Justice Marshall said:

> "It is a principle which has always been held sacred in the United States that laws by which human action is to be regulated look forward not backward; and are never to be construed retrospectively unless the language of the Act shall render such construction indispensable." (At 7 L. Ed. 476)

Said rule of construction has been applied by this Honorable Court invariably under numerous diverse, factual situations. *Hassett* v. *Welch*, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858; *U. S. Fidelity & Guarantee* v. *U. S.*, 209 U. S. 306, 28 S. Ct. 537; 52 L. Ed. 804; *U. S.* v. *Heth*, 3 Cranch. 399, 2 L. Ed. 479; *U. S.* v. *Burr*, 159 U. S. 78, 15 S. Ct. 1002, 40 L. Ed. 82; *Shwab* v. *Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747; *Royal Oak Drain District* v. *Keefe* (C. C. A. 6th) 87 Fed. 2d 786.

In the case of *U. S.* v. *St. L. S. F. & T. Ry. Co.*, 270 U. S. 1, 46 S. Ct. 182, 70 L. Ed. 435, the statute there under consideration evidenced a much more positive Congressional intent to give retrospective operation. In that case, the statute provided a three-year period of limitation which would apply to all causes of action, whether same accrued before or after the passage of the statute of limitation. More positive language could hardly be imagined. Nevertheless, Mr. Justice Brandeis, writing the opinion of this Honorable Court, denied application of the new statute of limitation to the pending lawsuit. Justice Brandeis stated in substance that to apply the new statute of limitation would raise a grave constitutional question which was to be avoided. The case just cited is precisely in point, but the State Courts brushed it aside.

The Supreme Court of Texas, in its opinion, held that petitioner's cause of action is predicated upon Section 217b of Part II of the Interstate Commerce Act, and hence the suit is not based upon a contract, but arises by reason of special statutory authority. The Court further stated that the right of action, being given by statute, may be taken away at any time. The State Court's major premise was fallacious, however, because petitioner's cause of action was based upon the performance of a contract of carriage, which had been fully performed by the carrier. In the case of *New* v. *Denison Clay Co.*, (C. C. A. 5th) 260 Fed. 70, it was held that a suit for a freight charge based upon bills of lading was not a suit on a liability created merely by statute, but was one on an agreement, contract, or promise in writing.

The case of *Pacific Mail Steamship Co.* v. *Joliffe*, 69 U. S. 450, 2 Wall. 450, 17 L. Ed. 805, is directly in point. In that case a statute of California provided that a licensed pilot was entitled to half-pilotage fees when he offered to pilot an incoming vessel into harbor where his offer was rejected. The pilot brought suit for such half-pilotage fees. The suit was defended on the ground that after his cause of action accrued, the California Legislature repealed the half-pilotage statute. The Supreme Court of the United States held that the pilot was nevertheless entitled to recover on the ground that his right was a vested right which should not be affected by the repealing of the statute. The court held that his right was in the nature of a contract and might be termed a quasi contract. The court held that when a right has arisen under a contract, or a transaction in the nature of a contract authorized by statute, and such right has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. That it has become a vested right, which stands independent of the statute.

In the instant case, Phoenix-El Paso Express had carried shipments in question and thereby fully completed its contractual obligation, as provided by the bills of lading. Nothing more remained to be done by the carrier. The duty rested upon respondent to pay the full, legal charges, as provided by the bills of lading and by *Title 49, U. S. C. A., Sec. 317b.* The right and duty to collect its full, legal freight charges accrued when the shipments were delivered to the consignee. Nothing more remained to be done by the carrier to perform fully its contracts of carriage. The right to collect its legal freight charges was vested, and it was not competent for the Congress to take away this right. Hence, it can not be presumed that the Congress intended any retroactive operation of the statute in question, to wit *Title 49, U. S. C. A., Sec. 1019.*

To give said statute the effect attributed it by the Court of Civil Appeals would result in an absurd construction. By thus construing said statute and by literally carrying out such construction to its logical conclusion, no Federal motor common carrier could collect any freight charges due from freight forwarders for services rendered prior to the enactment of Part IV of the Interstate Commerce Act.

In the case of *Haggar Co.* v. *Helvering*, 308 U. S. 389, 60 S. Ct. 337, 84 L. Ed. 340, it was held that a literal reading of a statute which leads to an absurd result is to be avoided when the statute can be given reasonable application.

Our view is strengthened by reading of the entire Act, Part IV of the Interstate Commerce Act, and especially Section 409 thereof, which provides as follows:

"(a) In order to provide a reasonable period of adjustment within which rates and charges may be established pursuant to the provisions of section 1008, nothing, in this chapter and chapters 1, 8, and 12 of this title shall be construed to make it unlawful for freight forwarders and com-

mon carriers by motor vehicle subject to chapter 8 of this title to operate under joint rates or charges during a period of eighteen months from May 16, 1942, but not thereafter. The provisions of chapter 8 of this title shall apply with respect to such joint rates or charges and the divisions thereof, and with respect to the parties thereto, as though such joint rates or charges had been established under the provisions of such chapter 8, and the provisions of this chapter shall not apply with respect thereto: *Provided*, however, That—

(1) Joint rates or charges and concurrences, contained in tariffs heretofore filed with the Commission shall become effective, without notice, as of May 16, 1942, unless the parties thereto file notice with the Commission, within thirty days after May 16, 1942, cancelling such joint rates or charges and concurrences;

(2) Joint rates or charges and concurrences, contained in tariffs heretofore offered for filing with the Commission, but rejected by the Commission, shall become effective, without notice, as of May 16, 1942, if filed with the Commission within thirty days after May 16, 1942;

(3) Joint rates or charges and concurrences, under which freight forwarders and common carriers by motor vehicle subject to chapter 8 of this title were actually operating on July 1, 1941, may become effective, without notice, as of May 16, 1942, if tariffs covering such joint rates or charges and concurrences are filed with the Commission within thirty days after May 16, 1942;

(4) After the expiration of six months from May 16, 1942, (i) no new or additional joint rates or charges or divisions may be established under authority of this section, and (ii) no change shall be made in any joint rate or charge or division established, or which becomes effective, pursuant to this sub-section, except as may be expressly authorized or required by order of

the Commission in the exercise of its powers under chapter 8 of this title;

(5) Any joint rate or charge or concurrence established, or which becomes effective, pursuant to this subsection may at any time be canceled or withdrawn in accordance with the provisions of chapter 8 of this title;

(6) The filing of tariffs under paragraph (2) or (3) of this subsection may be in accordance with the requirements with respect to the form and manner of filing tariffs in effect under chapter 8 of this title prior to December 31, 1936;

(7) For the purpose of computing the period of thirty days prescribed in paragraph (1), (2), or (3) of this sub-section, the date of mailing by registered mail shall be deemed the date of filing; and

(8) As used in this subsection the term "rates or charges" includes classifications, rules, and regulations with respect thereto.

(b) If the Commission shall find that the purposes of this section may be carried out within a shorter time than such period of eighteen months, it shall by order fix a date prior to the expiration of such period after which the joint rates or charges and concurrences referred to in this section shall no longer be lawfully in effect. Feb. 4, 1887, c. 104, Part IV, § 409, as added May 16, 1942, c. 318 § 1, 56 Stat. 290." (49 U. S. C. Sec. 1019).

It is significant that said Section 409 does not undertake in any way to validate the prior joint rates or concurrences between freight forwarders and common carriers. It is expressly stated that each of the provisions during the adjustment period shall become effective as of the date of enactment of Part IV of the Interstate Commerce Act.

In ascertaining the Congressional intent, the entire act should be examined, rather than the single section only,

that is, Section 419 of Part IV of the Interstate Commerce Act. Thus in *U. S.* v. *Burr*, 159 U. S. 78, 15 S. Ct. 1002, 40 L. Ed. 82, it is said:

> "Moreover, in arriving at the true intention of Congress, we cannot treat Section 1 as if it constituted the entire act, but must deduce the intention from a view of the whole statute and from the material parts of it" (At page 40, L. Ed. 84).

We now consider the constitutionality of said Section 419, of Part IV of the Interstate Commerce Act, insofar as it was intended to be or is, in fact, applicable to petitioner's lawsuit. Undoubtedly, petitioner's right of action herein is protected by the Fifth Amendment. In *Pritchard* v. *Norton*, 106, U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104, it was said:

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract, and are not based on equity and justice. Cooley, Const. Lim., 362-369" (at 27 L. Ed. 107).

In the case of *Chemical Foundation* v. *Du Pont* (C. C. A.), 39 Fed. 2d 366, affirmed 283 U. S. 152, 51 S. Ct. 403, 75 L. Ed. 919, it was said:

> "The right to the accrued royalties, in whomsoever vested, is a chose in action; a chose in action is property; and an act which takes property from one person and gives it to another without legal procedure to determine their rights and without compensation is a deprivation of property without due process of law and

is violative of the Fifth Amendment to the Constitution."

We recognize that Congress has the broadest powers under the Constitution to regulate interstate and foreign commerce, but, nevertheless, it has been held that the commerce power cannot abrogate the Fifth Amendment. Thus in *Currin* v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441, it was held that although the power of Congress to regulate interstate commerce is plenary, such power is subject to the "due process clause" of the Fifth Amendment.

We flatly assert that private vested rights between individuals cannot be abrogated by the legislative branch of the government. *Chemical Foundation* v. *Du Pont* (C. C. A.) 39 Fed. 2d 366, affirmed 283 U. S. 152, 51 S. Ct. 403, 75 L. Ed. 919; *Union Pacific Ry. Co.* v. *Laramie Stockyards Co.*, 231 U. S. 190, 34 S. Ct. 101, 58 L. Ed. 179; *Forbes Pioneer Boat Co.* v. *Board of Commissioners*, 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647; *Ettor* v. *Tacoma*, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773; *Choate* v. *Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941; *Lynch* v. *U. S.*, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434; *Herrick* v. *Boquillas Land & Cattle Co.*, 200 U. S. 97, 26 S. Ct. 192, 50 L. Ed. 389.

The Supreme Court of Texas held that petitioner's cause of action was based purely on a statutory right which could be repealed by Congress. The cases cited by the Supreme Court of Texas are correct in their respective factual situations; but the Supreme Court of Texas erred in its major premise to the effect that petitioner's cause of action was a mere statutory right.

Petitioner's contract of carriage had already been performed. The right to compensation had become vested. The case of *Pacific Mail Steamship Co.* v. *Joliffe*, 69 U. S. 450, 2 Wall. 450, 17 L. Ed. 805, is exactly in point. In said case, it was expressly held that when a right has arisen

under a contract or transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting the right, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute. It will be noted that in its opinion, the Supreme Court of Texas does not even mention the latter case.

The Supreme Court of Texas failed to grasp the distinction which has always been made in this Honorable Court between statutes involving vested rights and those which have to do with mere irregularities, special privileges, special defenses, and the like. The State Court in its opinion followed the rule that where an action is based entirely upon a statutory right, the cause of action falls with the repeal of the statute. The rule just stated has always been limited in its application to suits for penalties, forfeitures, *qui tam* actions, and the like.

The State Court held that it was evident that petitioner does not possess such a vested right as is protected by the Fifth Amendment. Further that such a right must be something more than a mere expectation based upon an anticipated continuance of the existing law. The State Court failed to realize that petitioner's cause of action does not depend upon the continuance of an existing law. Its contract was completed in 1937 and its right to compensation became vested at that time. Of course, if petitioner sought performance of an executory contract, which afterwards was prohibited by a statute (within the power of Congress to enact), petitioner could obtain no relief. Its private claims under its contract would have to yield to the sovereign power of the country. But such is not the case in the instant suit. Its cause of action arises from an executed contract of carriage, and failure on petitioner's part to col-

lect the undercharge would result in a discrimination forbidden by law.

In its opinion, the State Supreme Court relied heavily upon the case of *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240, 55 S. Ct. 407, 79 L. Ed. 885. A careful analysis of said case will show that it is not decisive of the question here presented, and the State Court utterly failed to comprehend the true meaning of the opinion in that case. The Supreme Court very properly held that the "gold clause" contained in the instruments there involved did not call for payment in gold as a commodity, or in bullion, but for the payment of money, the value of which could properly be regulated by Congress. It was held that the parties contracted with full knowledge of the Federal government's power to regulate the value of money, and that no contract nor any contractual rights could fetter the sovereign power and the Federal government in this respect. Moreover, by eliminating the gold clause, the Congress did not take away property. The holders of the gold clause contracts could still collect the full amount of their debt in legal tender of the United States. Certainly the decision would have been quite different if the Congress had undertaken to prevent the creditors from collecting their debts.

It is earnestly submitted that it was not competent for Congress to abolish petitioner's cause of action and judgment based thereon by the enactment of said Section 419 of Part IV of the Interstate Commerce Act. Said statute can be construed in a way to eliminate the constitutional question. This Honorable Court has repeatedly held that it will adopt that one of two possible constructions of a statute which will save and not destroy, and will not attribute to Congress an intention to defy the Fifth Amendment or even to come so close to doing so as to raise a serious question of constitutional law. *Anniston Mfg. Co.* v.

Davis, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 1143; *Panama Ry. Co.* v. *Johnson,* 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; *Arkansas Natural Gas Co.* v. *Arkansas RR. Co.,* 261 U. S. 379, 43 S. Ct. 387, 67 L. Ed. 705.

Conclusion.

WHEREFORE, petitioner respectfully prays that writ of certiorari be granted and upon hearing of this cause, the judgment of the Supreme Court of Texas be reversed and the judgment of the Forty-first Judicial District Court of El Paso County, Texas, be affirmed, and that petitioner recover its costs in this Court, and that petitioner have such other relief as it may be entitled to, either at law or in equity.

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Robert L. Holliday, one of the counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

ROBERT L. HOLLIDAY.

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 909.

PHOENIX-EL PASO EXPRESS, INC., *Petitioner*,

v.

NATIONAL CARLOADING CORPORATION, *Respondent*.

REPLY BRIEF OF NATIONAL CARLOADING CORPORATION.

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STATUTES AND CONSTITUTIONAL PROVISIONS.

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BRIEF OF NATIONAL CARLOADING CORPORATION IN REPLY TO PETITIONER'S BRIEF.

A. STATEMENT OF THE POINT AT ISSUE BEFORE THIS COURT.

Phoenix-El Paso Express, a partnership, at times here material, was engaged as a common carrier by motor vehicle in interstate commerce. It seasonably filed an application with the Interstate Commerce Commission for a certificate under section 206 of the Interstate Commerce Act. Respondent had on file with that Commission a similar application. Each had filed tariffs with that Commission. The respondent published and filed tariffs which named joint rates between various points in the United States. The Phoenix-El Paso Express was a party to those tariffs by appropriate concurrence or powers of attorney filed with the Interstate Commerce Commission. Under these joint tariffs the respondent and the Phoenix-El Paso Express divided the joint rates upon an agreed

basis. The Phoenix-El Paso Express also filed and published tariffs naming local rates applicable to local traffic transported between points served by it, including such points as El Paso, Texas, and Phoenix, Arizona.

The respondent accepted various shipments of merchandise at eastern points which it agreed to transport through to Phoenix, Arizona, in connection with the Phoenix-El Paso Express through El Paso, Texas. The through rates applicable from points of origin to Phoenix via El Paso in connection with the Phoenix-El Paso Express were shown in the published tariffs of the respondent in which, as heretofore stated, the Phoenix-El Paso Express concurred by power of attorney. In other words, respondent acted as agent for the Phoenix-El Paso Express in the publication of these joint through rates. It was agreed between the respondent and the Phoenix-El Paso Express that the latter should receive 45 cents per hundred pounds for its services from El Paso to Phoenix out of such joint through rates. Where a joint through rate is published in a tariff on file with the Interstate Commerce Commission applicable to interstate commerce, such a rate takes precedence over local rates and is the lawful rate applicable to the through shipment between points of origin and destination. *B. & O.* v. *Settle,* 260 U. S. 166; *Western Oil Co.* v. *Lipscomb,* 244 U. S. 346. The published rate applicable to interstate shipments must be exacted even though it violates the substantive provisions of the Interstate Commerce Act in that it is excessive, unreasonable and unjustly discriminatory. *L. & N.* v. *Sloss-Sheffield, etc.,* 269 U. S. 217.

At the time the shipments involved moved the respondent and the Phoenix-El Paso Express believed that each had a right to operate as a motor carrier of merchandise and that the tariffs in question, the concurrences and agreements under which the Phoenix-El Paso Express received 45 cents per hundred pounds were legal. That amount was paid by the respondent to the Phoenix-El Paso Express.

In *Tariffs of Freight Forwarding Companies*, 23 M. C. C. 95, decided May 7, 1940, the Commission found that the joint tariffs of respondent and other freight forwarding companies which maintained joint rates with common carriers by motor vehicle were not in consonance with section 217 (a) of the Interstate Commerce Act, and entered an order requiring that such tariffs be stricken. That order never became effective, having been postponed from time to time, and with the passage of Part IV of the Interstate Commerce Act May 16, 1942, the order was suspended. In that decision, the Commission followed its decision in the *Acme Case*, 17 M. C. C. 549, sustained in *Acme, etc.* v. *United States*, 30 Fed. Supp. 968, affirmed in 309 U. S. 638. On January 4, 1940, the Commission had determined that the respondent is not a common carrier by motor vehicle under the provisions of Part II of the Interstate Commerce Act, 21 M. C. C. 309. In that proceeding, the Commission dismissed the application of the respondent for a certificate to operate as a motor carrier under the provisions of the Motor Carrier Act.

Section 206 (a) of the Interstate Commerce Act affirmatively provides in connection with applications for certificates that,

> "Pending the determination of any such application, the continuance of such operations shall be lawful."

Among the thousands of applications which were filed with the Commission under the Federal Motor Carrier Act for certificates to operate as a common carrier or permits to operate as a contract carrier, it frequently happened that the Commission issued a cetificate when a permit was sought, and vice versa. Meanwhile, the applicant proceeded to function according to his own determination of his status. The *Craig Case*, 24 M. C. C. 331, is a good illustration. Craig assumed that he was a contract carrier and sought a permit to continue to operate as such. The Commission determined that he was a common carrier and it issued a certificate. The final determination was

not made until May 12, 1941. During the period from August 9, 1935, the date the Federal Motor Carrier Act was approved, until May 12, 1941, Craig conducted himself and complied with the rules, regulations and requirements of that act as applied to a contract carrier. The provisions of section 206 (a) and of section 209 (a) of the Interstate Commerce Act to the effect that "Pending the determination of any such application the continuance of such operation shall be lawful" were designed to protect applicants during the interim period against charges of illegality.

Section 217 (a) of the Interstate Commerce Act provides, among other things:

> "Any tariff so rejected by the Commission shall be void and its use be unlawful."

As the joint tariffs of the respondent and the Phoenix-El Paso Express were never rejected by the Commission, it follows that such tariffs were not void and without force and effect during the period the shipments in question moved. As was stated in *Toy Toy* v. *Hopkins*, 212 U. S. 540, 547, it rarely happens that things are wholly void and without force and effect as to all persons and for all purposes. To the same effect are *A. C. L.* v. *Florida*, 295 U. S. 301; and *Chicot County Drainage Dist.* v. *Baxter*, 308 U. S. 371.

The Phoenix-El Paso Express assigned its assets, including all choses in action, to the Phoenix-El Paso Express, Inc., the petitioner. The latter brought suit as assignee of the partnership, Phoenix-El Paso Express, against the respondent for the difference between the charge of 45 cents per hundred lbs., the amount of the division of the joint through rate which the partnership agreed to accept, and the local rate of 85 cents applicable to traffic from El Paso to Phoenix, as published in the local tariffs of the partnership. Judgment was rendered in the District Court in favor of petitioner on the theory that although the parties had agreed to a division of the through rate, the local rate of 85 cents was legally applicable and that petitioner

was entitled to recover on that basis. An appeal was then taken by respondent to the Court of Civil Appeals of the 8th Supreme Judicial District of Texas.

While the appeal was pending, Congress passed Public Law No. 558, Seventy-seventh Congress, Second Session, approved May 16, 1942, known as Part IV of the Interstate Commerce Act. This Act of May 16, 1942, contained Section 419, which reads as follows:

> "*Section 419.* No person shall be subject to any punishment or liability under the provisions of this Act on account of any act done or omitted to be done, prior to the effective date of this part, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this Act."

The Court of Civil Appeals held that by reason of the passage of the Act of May 16, 1942, any cause of action which plaintiff might have had no longer existed. (Opinions of Court of Civil Appeals pages 41 to 50, and page 55, in Transcript.) The Supreme Court of Texas came to the same conclusion. (Opinion of Supreme Court pages 63 to 73 in Transcript.)

B. ARGUMENT.

I. The report of the Committee on Interstate and Foreign Commerce, House of Representatives, Seventy-seventh Congress, First Session, Report 1172, supports the construction given to Section 419 by the Supreme Court of Texas, and confirms the view of that Court with reference to the constitutionality of Section 419. The following statements are taken from that Report:

> "SECTION 419. LIABILITY FOR PAST ACTS AND OMISSIONS
>
> "As has been previously explained in this report, freight forwarders and common carriers by motor vehicle subject to part II have been for a number of

years operating under joint rates which, by reason of the decision of the Commission in the *Acme case,* and in the other freight forwarder cases, they probably had no authority to establish and observe, even though the Commission's orders in those cases have not yet become effective. As a result of this, various persons may have subjected themselves to penalties and liabilities under Federal statutes, even though during the period of operation under such joint rates there may have been no deliberate intention to violate the law, and no way of knowing for certain whether they were violating the law. Freight forwarders may be liable on account of failure to pay the regular published tariff rates of common carriers by motor vehicle. Common carriers by motor vehicle may be subject to liability because of failure to collect from freight forwarders their regularly published local rates. It is possible that shippers may also technically be subject to liabilities.

"This section relieves freight forwarders, common carriers by motor vehicle, and other persons from penalties and liabilities under the Interstate Commerce Act or any other Federal Statute on account of anything done or omitted to be done, prior to the enactment of part IV, in connection with the establishment, charging, collection, receipt or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to part II.

"Common law and contractual rights, remedies and liabilities are not affected by this provision.

"The validity of this section, insofar as it relieves persons of liability to fines, penalties, and forfeitures running to the United States is beyond doubt, and insofar as it relieves persons of liability to individuals good authority exists for such action.

"The courts are generally agreed that rights of action based upon purely statutory grounds may be abolished by the legislature even after they have accrued (16 C. J. S. Constitutional Law Sec. 254; Ewell v. Daggs, 108 U. S. 143 (1883); Hazzard v. Alexander, 36 Del. 212, 173 A. 517 (1934); Wilson v. Head, 184 Mass. 515, 69 N. E. 317 (1904); cf. Carson v. Gore-Meenan, 229 Fed. 765, 767 (1916). The courts have

been particularly uniform in reaching this conclusion where the right of action is in the nature of a claim by an individual for the recovery of a statutory fine, penalty, or forfeiture (Ewell v. Daggs, 108 U. S. 143 (1883); Lemon v. Los Angeles Terminal Co., 38 C. A. (2) 659, 102 P. (2) 387 (1940); Anderson v. Byrnes, 122 Calif. 272, 54 P. 821 (1898); Denver & R. G. Ry. Co. v. Crawford, 11 Col. 598, 19 P. 673, 674 (1888). The authority of Congress or a State legislature to validate voluntary transactions between parties which at the time they were entered into were by statute invalid or illegal has been upheld by the United States Supreme Court in several cases (West Side R. R. v. Pittsburg Construction Co., 219 U. S. 92 (1910); McNair v. Knott, 302 U. S. 369, 372 (1937)."

(See also *Gross* v. *U. S. M. T. G. Co.*, 108 U. S. 477, 27 Law Ed. 795; *Lewis* v. *F. & D. Co.*, 292 U. S. 559, 54 Sup. Ct. 848.)

II. Part IV of the Interstate Commerce Act, if Construed to Prevent Plaintiff from Recovering Rates in Excess of Those Agreed Upon at the Time of the Shipments, is Not in Violation of the Constitution of the United States.

1. When Congress, in the exercise of its constitutional power to regulate Interstate Commerce, establishes a policy, existing conditions which would conflict with the execution of that policy, are not protected by the Fifth Amendment.

The Constitution of the United States provides:

"The Congress shall have power . . .

"To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes; . . . — And

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."

(Article I, Section 8, Clauses 3, 18.)

The pertinent provisions of Amendment V to the Constitution of the United States are as follows:

> ". . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In passing Section 419 of the Act approved May 16, 1942, Congress was exercising a power conferred upon that body by the Constitution of the United States, namely the power to regulate interstate commerce. The decisions of the Supreme Court conclusively establish that the provisions of the Fifth Amendment may not be invoked to frustrate or obstruct the carrying out of a national policy which Congress has the power to adopt.

No better statement with reference to the power of Congress in such a situation can be found than the statement contained in the opinion in *Norman* v. *B. & O. R. Co.*, 294 U. S. 240.

Chief Justice Hughes, speaking for the Court, said (pp. 307-308):

> "This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. See *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357.
>
> "This principle has familiar illustration in the exercise of the power to regulate commerce. If shippers and carriers stipulate for specified rates, although the rates may be lawful when the contracts are made, if Congress through the Interstate Commerce Commission exercises its authority and prescribes different rates, the latter control and override inconsistent stipulations in contracts previously made. This is so, even

if the contract be a charter granted by a State and limiting rates, or a contract between municipalities and carriers. *New York* v. *United States*, 257 U. S. 591, 600, 601. See, also, *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80-82; *Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp.*, 248 U. S. 372, 375."

In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, the Court said (pp. 485-486):

"We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived."

Philadelphia, B. & W. R. Co. v. *Schubert*, 224 U. S. 603, arose under the Federal Employers' Liability Act of April 22, 1908. A contract executed prior to the effective date of that Act was involved. The contention was made that the Act could not have the effect of changing previously existing relationships and agreements. In overruling this contention, the Supreme Court said (pp. 613-614):

"Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent,

the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."

In *Brotherhood of Railroad Shop Crafts* v. *Lowden*, 86 F. (2d) 458, the contention was made that Section 2 of the Railway Labor Act of 1934 could not abrogate an existing contract, because this would be in violation of the Fifth Amendment. The Court said (p. 461):

"The fact that the parties here were bound by an existing contract at the time the act became effective is no basis upon which to invoke the due process clause of the Fifth Amendment. The privilege of contract is not unrestricted. The right to make contracts which relate to interstate commerce must be exercised subject to the paramount power of Congress to enact appropriate legislation touching the subject matter. Any other rule would proscribe Congress in the exercise of its constitutional prerogative to regulate commerce among the states. The contract here was subject to the exercise of that power . . ."

(a) *The only restriction imposed by the Fifth Amendment upon Congress in the exercise of its constitutional powers is that its actions shall not be arbitrary, capricious and unreasonable, and that the means selected shall have a real and substantial relation to the end sought to be achieved.*

The above rule is illustrated and sustained by the following quotation from the opinion in *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, at p. 311:

". . . the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or ca-

pricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decision of the Congress as to the degree of the necessity for the adoption of that means, is final. *M'Culloch* v. *Maryland, supra,* (4 Wheat. 421, 423); Legal Tender Case (*Julliard* v. *Greenman*), *supra,* (110 U. S. 450); Stafford v. Wallace, 258 U. S. 495, 521; *James Everard's Breweries* v. *Day,* 265 U. S. 545, 559, 562."

(b) *Section 419 bears a real and substantial relation to the end sought to be achieved, and is not an arbitrary, capricious or unreasonable exercise of Congressional power.*

Prior to the enactment of the Motor Carrier Act, 1935, the freight forwarding industry performed a recognized and useful function in the national transportation system.

The declaration of policy adopted by Congress September 18, 1940, and set forth in Section 1 of the amendment to the Interstate Commerce Act of that date, stated the policy of Congress to be "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers . . .—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." This policy of Congress could not be realized effectively so long as the doubt and confusion resulting from the decision in the *Acme case* existed.

What would be the purpose of, or advantage in, the passage by Congress of Part IV of the Interstate Commerce Act regulating freight forwarders if the financial structure of the freight forwarders should be so weakened by claims such as those involved in this case that they could no longer perform their proper function? That Congress recognized

the existence of the problem, and Section 419 was intended to provide a final solution is abundantly clear from the Congressional reports.

It is apparent from the language of Section 419 that Congress adopted as the solution of the problem the comprehensive policy of settling definitely and for all time every question of criminal and civil liability that had arisen by granting complete immunity from all liability to every person involved.

2. In order to fall within the protection of the Fifth Amendment, rights must be founded either in contract or in grant, and they must consist in something more than the mere expectation of a benfit to be derived from the continued existence of a statute.

While petitioner contends that its suit for recovery is based upon a contractual right and not upon the statute, it is clear that as the rate which was the subject of the contract made at the time the shipments moved has been paid petitioner, and the contract therefore fulfilled, that petitioner has no standing to maintain the suit unless the right of action is found in section 217 (b) of the Interstate Commerce Act. That section imposes upon every common carrier subject to the provisions thereof the duty to collect the published tariff charges applicable to a particular shipment. The rate of such a carrier as to interstate commerce is not properly the subject of a contract. Therefore, petitioner did not acquire the right to maintain the action by virtue of any rate that might be the subject of a contract, express or implied. Nor did the existence of the contract or the performance of the service contemplated thereby give the petitioner any vested right to exact a particular rate or charge. On the contrary, the only charge that was the subject of a contract was the charge of 45 cents per hundred lbs. accepted by petitioner. As Congress by section 217 created the obligation on the part of a common carrier to collect the legally applicable published rates, it

follows that Congress can modify or abolish such obligations. That is precisely what Congress did by section 419 of the Interstate Commerce Act. This Court has held that Congress has the right to make legal, actions and transactions which may have been illegal. *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *United States* v. *Heinszen*, 206 U. S. 370; *Charlotte Harbor Ry.* v. *Wells*, 260 U. S. 8; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139.

Section 217(b) of the Motor Carrier Act does not give the Plaintiff or other common carriers by motor vehicle a "right" of action for the recovery of their rates and charges. This Section simply imposes upon common carriers by motor vehicle a "duty" to collect the "charges specified in the tariffs in effect at that time" (49 U. S. C. A., Section 317(b)). The provisions of Section 217(b) are almost identical with those of Section 6(7) of Part I of the Interstate Commerce Act. It is clear from the decisions of the Supreme Court arising under the latter section that the right of action for the recovery of charges specified in the applicable tariffs is inferred by necessary implication from the duty imposed by the statute, and is not created by the express language of the statute itself. *L. & N. R. Co.* v. *Maxwell*, 237 U. S. 94, 97-98.

In *G. H. & S. A. Ry. Co.* v. *Webster*, 27 Fed. (2d) 765, the Court, in speaking of the right of the carrier to sue for undercharges, said: "Its right to sue is given by the Interstate Commerce Act."

The right of action is merely a necessary corollary of the duty imposed upon the carrier to collect the charges prescribed by law. If the right did not exist, the duty could be nullified, and the policy of the Act defeated. *L. & N. R. Co.* v. *Maxwell*, 237 U. S. 94, 97-98; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, 482-483.

Section 217(b) of the Act does not exist primarily for the benefit of the Plaintiff. The primary purpose of this Section was to prevent the charging of unreasonable rates, and to prohibit unjust discrimination between shippers, and

any benefits which might accrue to Federal motor carriers are merely incidental consequences of the achievement of the principal objective of this Section.

Section 419 of Part IV of the Interstate Commerce Act has relieved the Plaintiff of any duty which may have existed to charge and collect the rates which they now claim to be due. Since the duty no longer exists, any right which the Plaintiff may have had to sue for the recovery of those rates falls.

Even though the rights asserted by the Plaintiff should be considered as in some sense "contractual", the contract is with respect to a subject over which Congress has power to act, and the contractual rights are, therefore, subject to a "congenital infirmity". (*Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 308.)

(b) *Where the sovereign power of the Government has, by statute, created or sanctioned the existence of a right which otherwise would not exist, such right may be taken away by a subsequent statute.*

In *Graham* v. *Goddcell*, 282 U. S. 326, the Court, speaking through Chief Justice Hughes, said (pp. 429-430):

> "It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist."

The claims which the Plaintiff is asserting are strictly analogous to a claim for the refund of a tax which has been paid through mistake. In such a case, the taxpayer is not entitled to a refund in the absence of a statute authorizing a recovery. If such a statute is repealed during the pendency of an action to secure a refund, and before a final judgment has been recovered and collected, the taxpayer has no redress. *People, ex rel. Eitel* v. *Lindheimer*, 371 Ill. 367, 371-375; *Southern Service Co.* v. *Los Angeles County*, 15 Calif. (2d) 1, 11-13, 97 Pac. (2d) 963.

In the *Lindheimer case*, the Court said (p. 373):

> "That the legislature cannot pass a retrospective law impairing the obligation of a contract, nor deprive a citizen of a vested right, is a principle of general jurisprudence, but a right, to be within its protection, must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. If, before rights become vested in particular individuals, the convenience of the State induces amendment or repeal of the laws, these individuals have no cause to complain."

The same result was reached by the Supreme Court of California after an exhaustive consideration of the Constitutional question in *Southern Service Co.* v. *Los Angeles County, supra.* In that case, an appeal to the Supreme Court of the United States was dismissed in 310 U. S. 610, and a petition for re-hearing was denied, 310 U. S. 658.

An analogous case is *U. S.* v. *Standard Oil Co. of California* (D. C. Cal.), 21 F. Supp. 645, affirmed 107 F. (2d) 402, Certiorari denied 309 U. S. 654, petition for re-hearing denied 309 U. S. 697.

Section 419 leaves the parties in exactly the same position as they were at the time Plaintiff's assignor transported the shipments for the Defendant and was paid in full for

such transportation on the basis of the agreements between the parties for a division of joint rates. The effect of Section 419 is, therefore, to validate the agreements for division of rates between the partnership and the Defendant, if indeed such agreements were invalid.

In *McNair* v. *Knott, Treasurer of the State of Florida,* 302 U. S. 362, the Supreme Court, in an opinion by Mr. Justice Black, said:

> "There is nothing novel or extraordinary in the passage of laws by the Federal Government and the States ratifying, confirming, validating, or curing defective contracts. Such statutes, usually designated as 'remedial', 'curative', or 'enabling', merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relating to mortgages, deeds, bonds and other contracts. Placing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. No party who has made an illegal contract has a right to insist that it remain permanently illegal. Public policy cannot be made static by those who, for reasons of their own, make contracts beyond their legal powers. No person has a vested right to be permitted to evade contracts which he has illegally made."

It is significant that in its report on the scope and effect of Section 419 the House Committee on Interstate Commerce cited both *McNair* v. *Knott,* 302 U. S. 362, and *West Side Belt R. Co.* v. *Pittsburgh Construction Co.,* 219 U. S. 92.

In *Ewell* v. *Daggs,* 108 U. S. 143, the Supreme Court said:

> "The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving

clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. The very point was so decided in the following cases (citing a number of cases).

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty which is taken away by a repeal of the Act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which contrary to law he actually made is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this Court (citing a number of cases).

"The right which the curative or repealing Act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect."

In *Gross* v. *U. S. Mortgage Company*, 108 U. S. 477, the Supreme Court said:

"That the act in question is not repugnant to the Constitution, as impairing the obligation of a contract is, in view of the settled doctrines of this court, entirely clear. Its original invalidity was placed by the court below upon the ground that the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that State to secure a loan of money. Whether that inhibition should

be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed, as well by the statute as by the public policy of the State, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt."

III. Part IV of the Interstate Commerce Act, When Properly Construed, Prevents Plaintiff From Recovering in This Case.

There is no warrant for the Plaintiff's assertion that the word "liability", as used in Section 419, is limited solely to the criminal liabilities and penalties imposed by the Interstate Commerce Act. There is nothing in the language of this section, or in the reports of the Congressional Committees, to indicate that the term "liability" was intended to be confined to criminal liabilities and penalties. It must be conceded that the term "liability" is broad enough to comprehend both civil and criminal liability. The plain language of Section 419 will not tolerate the construction for which Plaintiff is contending.

The exact language of the section is:

"Liability for Past Acts and Omissions

"Sec. 419. No person shall be subject to any punishment or liability under the provisions of this Act on account of any act done or omitted to be done, prior to the effective date of this part, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divi-

sions between freight forwarders and common carriers by motor vehicle subject to this Act."

Certainly the heading, "Liability for Past Acts and Omissions" is comprehensive enough to include any civil liability of the Defendant to the Plaintiff under the Interstate Commerce Act. The precise words used in the text itself are "punishment or liability". It does not require resort to the dictionary to establish that the word "punishment", in accepted uses, implies the pains and penalties, both imprisonment and fines, imposed for violation of a criminal or penal statute, while the word "liability" is used more often to describe an obligation imposed by law for the payment of sums of money, and the use of the disjunctive "or" indicates that Congress had this distinction in mind.

Moreover, the immunity granted by Section 419 extends specifically to liabilities arising "in connection with . . . joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this Act".

The proceedings before the Committees of Congress show clearly that the Act was intended to relieve freight forwarders of liability on claims of the very character asserted by the Petitioner in this case. The Committee reports leave no doubt about the construction which should be placed upon Section 419.

IV. The Fact That Plaintiff had Recovered a Judgment in the Trial Court, From Which an Appeal was Being Prosecuted, Will Not Save Plaintiff's Alleged Cause of Action From the Blight of Section 419.

A number of the cases which we have already cited sustain our position.

In the case of *West Side Belt R. Co.* v. *Pittsburgh Construction Co.*, 219 U. S. 927, to which we have referred, a suit had already been brought, and had finally terminated with a judgment denying a recovery on the contract which was illegal under the laws which existed at the time the

contract was made, and at the time the suit was brought. Thereafter, the bar of the statute was removed by new legislation. Another suit was brought on the contract, and recovery was permitted.

In the case of *Galveston H. & H. R. Co.* v. *Anderson*, 229 S. W. 998 (Court of Civil Appeals, Galveston, Writ Ref.), the Court said:

> "We think this contention should be sustained. In 1 Lewis' Sutherland's Stat. Cons. Sec. 282, p. 544, the general rule affecting causes of action arising upon a law, but tried after the repeal of such law, is stated as follows:
>
> 'The general rule is that where an act of the Legislature is repealed without a saving clause it is considered, except as to transactions passed and closed, as though it had never existed.'
>
> "Again, in section 285, p. 552, the author further states the rule as follows:
>
> 'When a cause of action is founded on a statute, the repeal of the statute before final judgment destroys the right, and the judgment is not final in this sense so long as the right of exception thereto remains.'
>
> "In *State* v. *T. & N. O. R. R. Co.*, 58 Tex. Civ. App. 528, 125 S. W. 53, heretofore cited, it is stated:
>
> 'By the repeal of a statute by a later statute on the same subject, all acts or omissions in violation of the former statute are pardoned, and the penalties incurred thereunder are no longer enforceable.'
>
> "We quote from Goodrich v. Wallis, 143 S. W. 285:
>
> 'The fact that the plaintiff's suit was pending at the time of the passage of the last act could make no difference; for it is well settled that if a statute, giving a special remedy, is repealed without a saving clause in favor of pending suits, all suits must stop where the appeal finds them; and, if final relief has not been granted before the repeal goes into effet, it

cannot be granted thereafter.' (Citing a number of cases.)

. . . .

"In *Norris* v. *Crocker*, 13 How. 429, 14 L. Ed. 210, referred to in Ex parte McCardle, it is stated:

'As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And in the next place, as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law.' "

In *Dickson et al.* v. *Navarro County Levee Imp. Dist. No. 3, et al.*, 139 S. W. (2d) 257, the Supreme Court of Texas adopted an opinion by Judge German, Commissioner, in which the following language appears:

"We have reached the conclusion that the effect of the Act of September 28, 1937, was to work an abatement of this suit, and that this makes it unnecessary to discuss other questions. It is almost universally recognized that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them, and if final relief has not been granted before the repeal goes into effect, it cannot be granted thereafter. A like general rule is that if a right to recover depends entirely upon a statute, its repeal deprives the court of jurisdiction over the subject matter."

If, as petitioner insists, the joint published rate on file with the Commission during the time the shipments in question moved violated the provisions of Part II of the Interstate Commerce Act, Petitioner would be subject to the criminal penalties provided in section 222 of that act (49 U. S. C. A. 322) except for section 419. Under its own theory and by its own admission, Petitioner is *particeps criminis*. Its position is that it should be free to mulct the respondent, or any other freight forwarder similarly situated, in a civil action for what it claims to have been the legal charges, while at the same time relying on section 419

for exoneration from the penalties provided in section 222 of the Interstate Commerce Act. Neither justice nor reason lend any support to the proposition that section 419 may or should be construed so as to permit Petitioner to enrich itself at the expense of respondent and at the same time receive immunity from all criminal penalties provided in the Interstate Commerce Act.

We respectfully submit that the petition should be denied.

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